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No. 89-1474

In the Supreme Court of the United States

October Term, 1990

MCDERMOTT INTERNATIONAL, INC.

Petitioner

vs.

JON C. WILANDER

Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF ON THE MERITS IN SUPPORT OF RESPONDENT

On Behalf Of

LOUISIANA TRIAL LAWYERS ASSOCIATION (LTLA)

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QUESTION PRESENTED

Seaman status under the Jones Act, 46 U.S.C. § 688; Will this Court reject its current test as presently articulated by the Fifth Circuit in exchange for a new test established by the Seventh Circuit which is inconsistent with decades of jurisprudence and legislative intent?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

INTEREST OF AMICUS CURIAE

The Louisiana Trial Lawyers Association is composed of approximately 2,000 lawyers engaged in litigation practice.

This Amicus Curiae brief, presented on behalf of the Louisiana Trial Lawyers Association, supports the position of Respondent. All parties to this action have consented in writing to its submission; letters are on file with the Clerk.

The purpose of this brief is to persuade the Court to maintain the existing test for seaman status which has served the marine industry well for decades.

It is interesting to note that, as of this date, no Amicus Curiae briefs have been presented which support the Petitioner's position. If the current test was either inequitable or unduly cumbersome, surely this would have been recognized as an opportunity to express that view.

SUMMARY OF ARGUMENT

This case involves the recurring question of what exactly is required to attain seaman status under the **Jones Act**? [1] Specifically, this Honorable Court is being called upon to abandon its longstanding test, generally followed by every circuit save one,[2] and in its place adopt

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1. 46 U.S.C. § 688.
2. See ATLA brief at pp. 2, 23-25; and Petitioner's brief at pp. 24-26.

the Seventh Circuit test which aberrantly requires participation in a vessel's transportation function. Essentially, the battle line has been drawn between this Court's established case law, as embodied in the current Fifth Circuit rule,[3] and the new Seventh Circuit rule.[4]

The Jones Act provides seamen who suffer personal injury in the course of their employment with an action for damages. While the term "seaman" is specifically contained in the Act, no statutory definition is provided for what is required to achieve that status.

Whatever clarity the term "seaman" presently enjoys has developed through an evolutionary, case-by-case process, assisted by some related legislative developments that have occurred since 1920 when the Jones Act was enacted.[5]

Recognizing the numerous developments in vessel design and function, the Fifth Circuit, for the past 30 years, has employed a test which confers seaman status to a worker whose duties contribute to the function of the vessel, the accomplishment of its mission, or its operation or welfare.[6] The Fifth Circuit's test is based upon and consistent with this Court's numerous rulings on the status issue.[7]

In contrast, the Seventh Circuit's test restricts seamen status to those workers whose duties are directly

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3. *See Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).
4. *See Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211, 105 S.Ct. 1180 (1985).
5. *See* ATLA brief at pp. 17-19.
6. *See Robison, supra* at note 3.
7. *See* notes 37-40, *infra*.

related to the transporation function of the vessel.[8] The Seventh Circuit's test is inconsistent with articulated congressional intent and, more importantly, with this Court's jurisprudence.

The LTLA has carefully studied the brief submitted by the ATLA and adopts the arguments contained therein. The fact that those issues are not addressed in this brief is not intended in any way to detract from the points made in the ATLA brief. However, it was felt that this Court would be best served by something other than a "me too" brief and, therefore, this brief will be limited to the specific issues raised by the petitioner.

ARGUMENT

(1) THE JONES ACT; EXPANSIVE CONSTRUCTION REQUIRED

The Jones Act is remedial legislation which must be liberally construed in favor of enlarging the protection of seamen.[9]

In passing the Jones Act, Congress did not intend to create a static remedy, but one which would respond to meet changing conditions and the commensurate responsibility of the maritime industry toward its vessel based workers.[10]

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8. *See Johnson, supra* at note 4.
9. *See Cox v. Roth*, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260 (1954); *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 69 S.Ct 1317, 93 L.Ed 1692 (1949); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct 246, 87 L.Ed. 239 (1942); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939); and *The Arizona v. Anelich*, 298 U.S. 110, 56 S.Ct 707, 80 L.Ed 1075 (1936).
10. *Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32, 78 S.Ct. 394 (1958).

Thus, as Judge Wisdom expressed in *Offshore Co. v. Robison*:[11]

> There is no reason for lamentations. Expansion of the terms "seaman" and "vessel" are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act. There is nothing in the Act to indicate that Congress intended the law to apply only to conventional members of a ship's company. The absence of any legislative restriction has enabled the law to develop naturally along with the development of unconventional vessels, such as strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico. [12]

(2) THE "MARITIME EMPLOYMENT" RED HERRING

The petitioner attempts to use the Jones Act and Longshore Act's[13] common heritage, based upon the Commerce Clause, to borrow the Longshore Act's "maritime employment"[14] jurisdictional requirement and make it an element of the test for seaman status under the

11. *Supra* at note 3.
12. *Id.* at 780.
13. 33 U.S.C. §§ 901 et seq..
14. 33 U.S.C. § 902 (3).

Jones Act. This contention is clearly specious. While the Commerce Clause confers congressional authority to enact legislation regulating activity that has a substantial effect on interstate commerce, it does not mandate that all legislation passed under its purview be co-extensive. Quite to the contrary, this Court has specifically held that the LHWCA and the Jones Act are mutually exclusive.[15]

The Jones Act permits recovery for "*[a]ny seaman*" injured in the course of his employment,[16] whereas the LHWCA extends to persons "*engaged in maritime employment*"; but, "*a master*" or "*member of a crew of any vessel*" is specifically excluded from LHWCA coverage.[17]

Despite this mutual exclusivity, the petitioner contends that this Court's decisions in *Rodrigue v. Aetna Casualty and Surety Co.*[18] and *Herb's Welding, Inc. v. Gray*[19] somehow have undermined the Fifth Circuit's test in *Robison.*[20] First, neither one of these decisions deals with the Jones Act and, therefore, these cases have no persuasive value in that regard. Second, the petitioner erroneously interprets *Herb's Welding* to mean that **all** "oilpatch" activity is non-maritime in nature no matter where the activity takes place. This Court did not even remotely suggest, much less hold, that workers engaged in offshore drilling on a floating or floatable contrivance were not seamen and/or were not engaged in "maritime employment". What this Court did hold was that a

15. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 LEd 1045 (1946).
16. *See* Jones Act, 46 U.S.C. § 688 (a).
17. *See* LHWCA, 33 U.S.C. § 902 (3)(G).
18. 395 U.S. 352, 89 S.Ct. 1835, 23 LEd. 2d 360 (1969).
19. 470 U.S. 414, 105 S.Ct. 1421, 84 LEd 2d 406 (1985).
20. *Supra* at note 3.

stationary platform based employee, performing oilpatch activities in state waters, was not engaged in "maritime employment" for purposes of the LHWCA.[21]

The petitioner exploits its misinterpretation of *Herb's Welding* by asking this Court to use the LHWCA's concept of "maritime employment" as the vehicle to determine seaman status under the Jones Act. However, the LHWCA's "maritime employment" concept has never been and cannot be used as a criteria for determining seaman status.

According to this Court, the 1972 amendments to the LHWCA, which include a provision making the Act applicable to *"any person engaged in maritime employment"*,[22] were soley intended to delineate the scope of LHWCA coverage landward of the water's edge.[23] The "maritime employment" concept was not meant to apply seaward of that line to determine LHWCA coverage much less seaman's status.[24]

In fact, this Court has held that in construing the LHWCA's terms, other statutes having other purposes are of little aid.[25] Likewise, using this reasoning, in construing the Jones Act, the LHWCA is neither controlling nor instructional. Illustrative is the fact that even basic terms such as "vessel" and "in navigation" enjoy

21. *See Herb's Welding, supra* at note 19.
22. 33 U.S.C. § 902 (3) (emphasis added).
23. *See Director, OWCP v. Perini North River Associates,* 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed. 2d 465 (1983); and *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977).
24. *See Director, OWCP v. Perini, supra* at note 23; and *Legros v. Panther Services Group, Inc.,* 863 F.2d 345 (5th Cir. 1988).
25. *South Chicago Dock Co. v. Bassett,* 309 U.S. 251 (1940).

different meanings under the Jones Act and under the LHWCA. Specifically, the Jones Act definition of the "vessel" cannot be substituted for the word "vessel" in Section 905(b) of the LHWCA.[26] Furthermore, the test of whether a vessel is "in navagition" under the Jones Act is different than the test of "vessel" status under Section 905(b).[27]

When faced with the question of whether an employee is covered under the LHWCA versus the Jones Act, the courts have applied the seaman status test to first determine whether Jones Act coverage applies.[28] Therefore, a plaintiff is not afforded remedies under the LHWCA unless he is unable to demonstrate that a factual issue exists as to whether or not he is a seaman.[29]

(3) UNDER NEW TEST SEAMAN WOULD WALK IN AND OUT OF COVERAGE AND FELLOW CREWMEMBERS WOULD HAVE DIFFERENT REMEDIES

The strict aid in navigation test espoused by the petitioner would require the worker to serve some

26. *See Orgeron v. Avondale Shipyards, Inc.,* 561 So. 2d 38 (La. 1990).
27. *See Hall v. Hvide Hall No. 3,* 746 F.2d 294 (5th Cir. 1984), *cert. denied,* 474 U.S. 820, 106 S.Ct. 69, 88 L.Ed. 2d 56 (1985).
28. *See, e.g., Salgado v. M.J. Rudolph Corp.,* 514 F.2d 750,755 (2d Cir. 1975); *Simko v. C & C Marine Maintenance Co.,* 594 F.2d 960 (3d Cir.), *cert. denied,* 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed. 2d 42 (1979); *McDermott v. Boudreaux,* 679 F.2d 452 (5th Cir. 1982); *Slatton v. Martin K. Eby Construction Co.,* 506 F.2d 505 (8th Cir. 1974), *cert. denied,* 421 U.S. 931, 95 S.Ct. 1657, 44 L.Ed 2d 88 (1975); and *Estate of Wenzel v. Seaward Marine,* 709 F.2d 1326 (9th Cir. 1983).
29. *See Buras v. Commerical Testing & Engineering Co.,* 736 F.2d 307, 309 (5th Cir. 1984); and *Petersen v. Chesapeake and Ohio Railway Co.,* 784 F.2d 732, 739 (6th Cir. 1986).

transporation function to attain seaman status. Incorporation of such a test would create the undesirable situation where a worker would walk in and out of Jones Act coverage depending on the task to which he is assigned. This would also lead to the inequity of two workers on the same vessel, both exposed to the same hazards incident to employment aboard the vessel, being afforded different remedies, depending on who, at any given time, was incidentally participating in navigation functions. Certainly, this is not the kind of uniformity and consistency Congress wanted to promote.

The record in the instant case indicates that Wilander piloted the boat at times. If he had been injured while doing that task, he would be covered under the Seventh Circuit's test. Thus, under the new test proposed by the petitioner, Wilander would be walking in and out of Jones Act coverage depending upon what he was doing at the moment of injury. It is inconsistent with the purpose of the Jones Act to make a rule related to the nature of the claimant's specific assignment at the time of injury while completely ignoring the maritime perils which **everyone** employed aboard the vessel is exposed to. The Act simply does not support such a narrow reading. In fact, once seaman's status is achieved, coverage is afforded regardless of where an accident occurs, even shoreside.[30]

(4) THE FELA ARGUMENT

The petitioner makes an entirely tangential analogy between maritime commerce (with coverage under

30. *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596 (1943).

the Jones Act) and interstate commerce (with coverage under the Federal Employers Liability Act[31] ("FELA")). The petitioner incorrectly maintains that the Jones Act and the FELA are parallel with regard to a requirement that there be at least some connexity between a claimant's employment function and transportation. The petitioner mistakenly arrives at this conclusion, ostensibly, from jurisprudence holding that the Jones Act was intended to provide the same remedy to seamen that railroad employees are afforded under the FELA.[32] However, the obvious differences, readily apparent from the language of the acts and the function of railcars versus vessels, render petitioner's argument untenable. The FELA provides:

> [e]very common **carrier** by railroad **while engaged in commerce between any of the several States**...or between...any of the States...and any foreign nation or nations, shall be liable in damages to any person suffering injury **while he is employed by such carrier in such commerce...**[33]

Under the FELA, commerce by rail (a transporation function) is required of both the plaintiff worker and the defendant railroad by the express terms of the Act. It is evident from the language of the FELA that Congress realized, when it fashioned these provisions, that the basic if not exclusive function of a railroad is to

31. 45 U.S.C. §§ 51 et seq..
32. *See, e.g., O'Donnell, supra* at note 30; and *Buzynski v. Luckenbach Steamship Co.*, 277 U.S. 226, 48 S.Ct. 440, 72 L.Ed. 860 (1928).
33. 45 U.S.C. § 51 (emphasis added).

transport cargo or passengers from one place to another.[34] The courts must look for some connexity between an FELA claimant's employment and the transporation function of the carrier because that is precisely what the FELA requires statutorily.[35]

However, in marked contrast, the language of the Jones Act provides that:

> Any seaman who shall suffer personal injury **in the course of his employment** may...maintain an action for damages at law...and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply...[36]

The Jones Act is totally void of any mention of commerce or transportation. Moreover, this Court has consistently conferred Jones Act coverage to workers, assigned to vessels, who were not engaged in any transportation functions.

In *Gianfala v. Texas Co.*[37], this Court reinstated a jury's finding that a submersible drilling barge resting on the bottom of the bay was a Jones Act vessel, and that a worker killed while loading pipe on the drilling barge was a seaman.

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34. *See also Kieronski v. Wyandotte Terminal Railroad Co.*, 806 F.2d 107 (6th Cir. 1986); and *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir.) *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed. 2d 471 (1967).
35. *See Shanks v. Delaware, L. & W. R. Co.*, 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436 (1916); and *Reed v. Pennsylvania Railroad Co.*, 351 U.S. 502, 76 S.Ct. 958 (1956).
36. 46 U.S.C. § 688 (a) (emphasis added).
37. 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955).

In *Senko v. LaCrosse Dredging Corp.*[38], this Court affirmed a jury's finding of vessel status of a dredge and seaman status of a laborer on the dredge who had no duties connected with the moving of the dredge, but rather, his primary duty was to maintain the dredge during its anchorage and for its future trips.

In *Grimes v. Raymond Concrete Pile Co.*[39], this Court affirmed a jury's finding of seaman status of a pile driver who drowned when he fell out of a life ring used to carry him from a tug to an offshore structure after he had been working on a construction barge.

In *Butler v. Whiteman*[40], this Court affirmed a jury's finding of seaman status of a laborer who did odd jobs around his employer's wharf and was last seen alive running across the barge to the tug, both owned by his employer, and both lashed to the wharf and withdrawn from navigation because the tug was inoperable.

Circuit court jurisprudence likewise contains a plethora of cases conferring Jones Act status to seamen working aboard unconventional and special mission craft.[41]

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38. 350 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404, *rehearing denied*, 353 U.S. 931, 77 S.Ct 716, 1 L.Ed. 2d 724 (1957).
39. 356 U.S. 252, 78 S.Ct. 687, 688, 2 L.Ed. 2d 737 (1958).
40. 356 U.S. 281, 78 S.Ct. 734, 2d L.Ed. 2d 754 (1958).
41. *See, e.g., Harney v. Moore*, 359 F.2d 649 (2d Cir. 1966) (reversal of the trial court's dismissal of a Jones Act claim by a plaintiff injured in a fall from a construction barge used on a bridge-building project where the plaintiff's duties were to keep a cofferdam pumped out and to keep water out of the barge); *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959) (a roughneck on a submersible drilling barge is a seaman); *McDermott v. Boudreaux, supra* at note 28 (a welder on a pipelaying barge is a Jones Act seaman); *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817 (5th Cir. 1975), *cert. denied, sub nom. Hughes v. Ocean Drilling & Exploration Co.*, 423 U.S. 1050,

It is well settled that "vessel" status for Jones Act purposes is not limited to vessels engaged solely as a means of transport on water. The mere capacity to provide transportation over water suffices in determining Jones Act "vessel" status, a critical component of the associated "seaman" status inquiry.[42] Obviously, it would be patently incongruous to require a seaman to perform transportation functions when, by congressional definition found in 1 U.S.C. § 3, the vessel on which he is working need not even be used for that purpose.

(5) THE "LUCRATIVE REMEDY" MYTH

The petitioner alleges that the respondent's claims are motivated by inventive plaintiff attorneys who are attempting to obtain the more "lucrative" benefits afforded by the Jones Act. Assuming, anguendo, this is correct, then the petitioner's brief is merely another argument by inventive defense counsel to restrict Jones Act coverage and substitute it for "less lucrative" LHWCA remedies. The truth is, each Act has disadvantages and neither Act is necessarily more lucrative. For example, if a Jones Act employee is injured or killed under circumstances where there is no liability, then, unquestionably, coverage under the LHWCA would be preferable. Illustratively, if a Jones Act employee lost

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96 S.Ct. 777, 46 L.Ed. 2d 639 (1976) (laborers on a submersible oil storage facility are Jones Act seamen); *Searcy v. E.T. Sider*, 679 F.2d 614 (6th Cir. 1982) (reversal of the granting of a partial summary judgment dismissing a Jones Act claim brought by the widow of a night watchman who drowned after an apparent fall from one of several barges he was assigned to check every two hours, as part of his duties, and to keep the pumps on the barges fueled); and *Slatton v. Martin K. Eby Construction Co., Inc., supra* at note 28 (a welder on a floating construction barge is a Jones Act seaman).

42. *See, e.g., Robison, supra*, at note 3; and *McDermott supra*, at note 28.

both lower extremities in an accident involving no liability, once maximum medical cure was reached, the employee would be entitled to no benefits whatsoever, whereas under the LHWCA, substantial weekly payments and medical benefits would be available. Coverage under the Jones Act is a legislative mandate, not the product of "inventive" counsel.

CONCLUSION

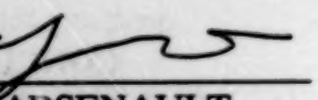
The Jones Act is remedial legislation. With its enactment, Congress did not intend to create a static remedy, but instead one which would be liberally construed in favor of enlarging the protection of seamen commensurate with the responsibility of the maritime industry toward its vessel based workers. Cognizant of the prevailing test for seaman status, Congress has declined to modify the existing rule despite several opportunities to do so.

The petitioner would have this Court adopt the *Johnson* test, a new and unorthodox approach by a circuit which acknowledges its relative lack of experience with seaman status issues. Even the petitioner concedes that the Seventh Circuit stands alone with its frontal assault of the current rule. The Seventh Circuit's test is irreconcilable with this Court's decisions and repugnant to clearly articulated legislative intent. The transportation employment function required by *Johnson* has no statutory support. In fact, neither the language of the Jones Act nor this Court's rulings require transportation related functions for seaman or vessel status. The *Johnson* case should be recognized for the aberration it is.

This Honorable Court should not abandon its longstanding test as currently embodied in *Robison*. The existing rule should be recognized and applied as the uniform national rule.

Respectfully submitted,

NEBLETT, BEARD & ARSENAULT



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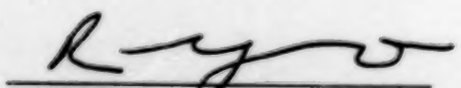

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